UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOURTEEN

ST. LOUIS SYMPHONY ORCHESTRA,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 14-RC-236036**
	)	
MUSICIANS ASSOCIATION OF ST. LOUIS, LOCAL 2-197, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO	)	
	)	
Petitioner.	)	

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

Pursuant to §102.67(f) of the National Labor Relation Board's Rules and Regulations, Petitioner Musicians' Association of St. Louis, Local 2-197, American Federation of Musicians, AFL-CIO, hereby files its Statement in Opposition to Employer's Request for Review of the Regional Director's Decision and Direction of Election. In support thereof, Petitioner states as follows:

I. Standard of Review

Employer seeks review of the Regional Director's Decision and Direction of Election without properly indicating the standard of review or the heightened burden such a request carries. The Board's Rules and Regulations allow for review "only where compelling reasons exist therefor." They then enumerate the following narrow grounds for reviewing a Regional Director's decision:

1. That a substantial question of law or policy is raised because of
   (i) The absence of; or
   (ii) A departure from, officially reported Board precedent.

2. That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
3. That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
4. That there are compelling reasons for reconsideration of an important Board rule or policy.

§102.67(d)

The Employer fails to articulate this standard of review or establish how its "Issues Presented" relate to the standard, which the Board is required to apply when determining whether to grant review.

Given the contents of the Employer's Request and the longstanding legal precedent for an *Armour-Globe* election under these circumstances, it is safe to presume that the Employer intended to challenge the factual findings by the Regional Director. But where the Employer does challenge the factual findings, it fails to demonstrate that such findings were "clearly erroneous" and worthy of review. The 8th Circuit holds that the "clearly erroneous" standard of review requires a showing that the finding "lacks substantial evidence" or "even when there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Day v. Johnson* 119 F.3d 650, 654 (8th Cir. 1997), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The Employer's request falls short of meeting this standard. Moreover, the record and Regional Director's Decision and Direction of Election independently demonstrate that none of these grounds are met. Accordingly, the Board should reject the Employer's request for review.

II. The Regional Director properly determined that Ms. Brugger is not a 2(11) supervisor.

The Employer argues that Ms. Brugger, the Head Librarian, is a supervisor under §2(11) of the National Labor Relations Act (NLRA) and should be excluded from the bargaining unit.

The burden of proving supervisory status rests with the party that is asserting it, which in this case is the Employer. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). In fact, the evidentiary burden on the proponent is substantial, requiring more than conclusory evidence. *Lynwood Manor*, 350 NLRB 489, 490 (2007). Though the Employer correctly identifies indicia used for determining supervisory status, it almost exclusively relies on secondary indicia not enumerated in the NLRA. Furthermore, the Employer raises a new argument that Ms. Brugger allegedly adjusted grievances, after presenting no such argument or evidence during the hearing. Ultimately, the Employer fails to meet its burden of showing that any of the Regional Director's findings on the supervisory issue were "clearly erroneous" and prejudicially affect the Employer's rights.

Both the record and the Employer's argument for review is replete with evidence of secondary indicia which are not dispositive of supervisory status and were properly treated in the Regional Director's decision. *Chrome Deposit Corp.*, 3232 NLRB 961, 963 fn. 9 (1997)("[I]t is well settled that secondary indicia are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of such status."). These include "how the individual is viewed", setting the budget, and scheduling time off for others as well as those identified by the Regional Director including conducting evaluations, making purchases, and drafting job descriptions. Moreover, the Regional Director properly concluded that "[t]he mere fact that employees 'report' to the main librarian does not make her a supervisor. This is not a Section 2(11) indicia." DDE pg. 21. Though Ms. Brugger's involvement in these activities can be used as background evidence, they were properly discounted in the Regional Director's decision and they should similarly be treated as non-dispositive in this request for review.

Other supervisory indicia the Employer relies upon were properly dismissed by the Regional Director because there was simply no evidence of Ms. Brugger ever exercising such authority. With regard to her authority to discipline, reward, or adjust grievances, the Employer presents no evidence and relies on speculation to argue Ms. Brugger's supervisory status. For the first time in its Request for Review, the Employer mischaracterizes her offer of flexible scheduling at the time of Mr. Skolnick's hiring as "adjustment of a grievance." But as the Regional Director properly notes, setting the schedule is non-dispositive secondary indicia of supervisory authority. Req. pg. 15, DDE pg. 20. Additionally, Ms. Brugger working with Mr. Skolnick to accommodate his schedule bears no resemblance to a supervisor who adjusts union members' grievances, which is the supervisory relationship contemplated under §2(11) of the NLRA.

Similarly, there is no evidence on the record of Ms. Brugger ever exercising the authority to discipline or reward. While the Employer is correct that infrequent exercise of supervisory authority supports finding 2(11) authority, it failed to demonstrate that she ever exercised that authority. *See* req. at 16. Neither *Vacuum Platters* nor *The New Jersey Famous Amos* gives the Employer the luxury of speculating that Ms. Brugger could have exercised supervisory authority in the absence of evidence she ever actually exercised the alleged authority. *See Vacuum Platters*, 154 NLRB 588 (1965); *The New Jersey Famous Amos*, 236 NLRB 1093 (1978). Accordingly, the Regional Director properly found that the Employer failed to meet its burden of proof. DDE pg. 17, 19.

The Employer's argument that Ms. Brugger exercised the authority to reward through promotion or raise, or at least effectively recommend a promotion or raise, is unpersuasive because the evidence only supports the assertion that she can merely suggest raises or

promotions. Ms. Brugger regularly made recommendations that both Mr. Skolnick and Ms. Tallant receive raises, but that recommendation was only partially followed on one occasion. Ex. E. This does not support the conclusion that she can even "effectively recommend" a supervisory action. *Children's Farm Home*, 324 NLRB 61, 61 (1997). After multiple requests by Ms. Brugger and review by both the Vice President of Artistic and the President, Mr. Skolnick received a promotion and a raise which was 2/3 of what Ms. Brugger requested. The Regional Director was correct to find, based on the multiple levels of review and the fact that Ms. Brugger's recommendation was only partially followed, that she lacks the authority to effectively recommend rewarding Mr. Skolnick or Ms. Tallant as a 2(11) supervisor would.

Ms. Brugger also lacks the authority to set Ms. Tallant's salary and the record demonstrates that her involvement in setting her initial salary falls far short of an indicium of supervisory authority. The Employer construes Ms. Brugger's request that Ms. Tallant's salary be commensurate with the amount the Symphony advertised as an indicium of supervisory authority. However, because it does not fall into any of the statutorily enumerated categories, at best it constitutes yet another secondary indicium. *See* NLRA §2(11).

The only factors on which the Employer arguably makes a *prima facie* case for supervisory status of Ms. Brugger are her authority to hire or effectively recommend her, and her ability to assign work. Ultimately, the Regional Director correctly found that the Employer failed to meet its burden on these factors. As the Regional Director noted, when management is directly involved in the decision to hire, it supports the conclusion that the other employees involved do not effectively recommend hiring as contemplated in the NLRA. *See Waverly-Cedar Falls Health Care*, 297 NLRB 390, 391 (1989)(finding that, even though licensed practical nurses interviewed job candidates and made recommendations, because the personnel director did not

rely on their recommendations without further inquiry, the nurses did not "effectively recommend hiring or firing"); *Ryder Truck Rental*, 326 NLRB 1386 fn. 9 (finding that '[w]here supervisors. . . participate in the interview process, it cannot be said employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11)"); *The Republican Company*, 361 NLRB No. 15, 19–20 (2014)("Absent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates.") Members of management were involved in drafting the job description, reviewing it, posting the announcement, reviewing resumes, interviewing candidates, and making the final hiring decision. Without additional evidence that Ms. Brugger herself made the hiring decision or effectively recommended hiring without the involvement of management, the Regional Director properly found that the Employer failed to demonstrate she exercised supervisory authority.

The Employer also notes that Ms. Brugger has a role in assigning work, but the record demonstrates that her role is limited to the point that it, too, does not reach the threshold of supervisory activity. The Board in *Oakwood Healthcare* defined "assign" as "the act of designating an employee to a place… appointing an employee to a time… or giving significant overall duties" to an employee. *Oakwood Healthcare* at 689. The uncontroverted testimony is that Ms. Brugger does not "assign" tasks but rather decisions about the responsibility for projects are made collaboratively. Much unlike the hospital setting in *Oakwood Healthcare*, librarians take responsibility for assignments based on their specialty or workload in contrast to nurses assigning others to different patients, wards, or duties. *See id.* Rather than an exercise of supervisory authority, this process is "merely routine" based on the circumstances as the need arises. *Oakwood Healthcare* at 694.

And because the assignment of Mr. Skolnick and Ms. Tallant to the Pulitzer, Youth Orchestra, and family concerts was based on their known skills, Ms. Brugger did not exercise independent judgment in making these assignments. Assigning employees according to their known skills is not indicative of independent judgment and instead indicates merely routine assignments. *Shaw, Inc.*, 350 NLRB 354, 356 fn. 9 (2007). Moreover, these programs constitute a small fraction of the work of the library with the majority of the assignment of work done in the collaborative manner already described.

Because Ms. Brugger's role in the assignment of work falls short of the authority contemplated by Sec. 2(11), the Regional Director was correct to find that she is not a supervisor under the Act and should be included in the proposed bargaining unit.

III. The Regional Director was correct to order an *Armour-Globe* election because a community of interest exists between the existing bargaining unit and the orchestra librarians.

The Board utilizes numerous factors to determine whether two groups of employees share a community of interest which include the location of work, skills and training, job functions, employee interchange, frequency of contact, functional integration, administrative divisions, supervision, terms and conditions of employment, and bargaining history. *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017); *Odwalla Inc.*, 357 NLRB 1608 (2011); *Northrup Grumman Shipbuilding, Inc.*, 357 NLRB 2015 (2011); *DTG Operations, Inc.*, 357 NLRB 2122 (2011); *In re Unisys Corp.*, supra.; *Warner-Lambert Co.*, supra., *Overnite Transportation*, 322 NLRB 723, 724 (1996). The Regional Director properly relied upon the location/frequency of contact, skills and training/interchange, job functions and integration, administrative decisions/supervision, and terms and conditions of employment/history of collective-bargaining, the totality of which strongly support a finding a community of interest. DDE pgs. 9–11.

In challenging the unit that the Regional Director deemed appropriate, the Employer must "show the *prima facie* appropriate unit is 'truly inappropriate.'" *Blue Man Vegas, LLC v. NLRB*, 529 NLRB 417, 429 (DC Cir. 2008). While the Employer dedicates much of its Request to differences between the job duties of musicians and librarians, it overstates the distinction between the two and only cites one case in support which is factually distinguishable. Both librarians and musicians are significantly aided by an advanced degree in music, each of the librarians has an advanced music degree, and those musicians who lack advanced degrees must demonstrate the same aptitude with their instrument. Performance experience is important to both jobs and, though it is only a preferred qualification for librarians, all three librarians have experience as performing musicians. And finally, both positions require an audition or test during which the candidate must demonstrate their ability to perform the job.

The Employer cites *Bradley Steel* to support its argument that the physical differences in the performance of the work is indicative of community of interest fails to divulge the facts of that case. 342 NLRB 215 (2004). In *Bradley Steel*, the Petitioner requested review of the Regional Director's determination that the "detailers and the purchasing agent/expediter" had to be included in the requested unit and therefore inquired into whether a "s*ubstantial* community of interest" existed. *Id.* at 216 (emphasis added). Because *Bradley Steel* was not a case involving *Armour-Globe* analysis, the Board did not use the legal analysis that is relevant here. *Id.* Rather than the standard in that case, here it is the Employer's "burden to show the *prima facie* appropriate unit is 'truly inappropriate.'" *Blue Man Vegas, LLC*, *supra.* Given that the Board in *Bradley Steel* applied a factually intensive review of units found in a very different industry under a different standard of review, it is not particularly persuasive to the analysis of community of interest in the *Armour-Globe* context here.

In contrast, on three separate occasions, the Board has ruled that symphony musicians and librarians share a community of interest and ordered an *Armour-Globe* election. *The John F. Kennedy Center for the Performing Arts*, NLRB, Case 05-RC-162889 (2015); *Washington National Opera*, NLRB Case 05-RC-162892 (2015); *San Francisco Symphony*, NLRB Case 20-RC-077284 (2012); The facts in these cases are remarkably similar to those here and the analysis in those circumstances support the finding that a community of interest exists in this case as well.

The Employer erroneously argues that, because the musician's terms and conditions are bargained collectively rather than determined unilaterally, there is no community of interest between them. The terms and conditions over which the Employer has control which have not been altered by the bargaining relationship are those that illuminate whether a community of interest exists. Those terms and conditions which differ between the groups because of their incongruent bargaining relationship with the employer do not implicate whether they share a community of interest. *See Exemplar, Inc.*, Reg. Dir. Dec. LEXIS 85 (2015). So, because the both groups are salaried, paid in the same pay period, have longer hours during the main and opera seasons, and are bound by the same dress code, a community of interest is implied.

The Employer also inaccurately asserts that, because the full-time librarian position has historically not been part of the bargaining unit, it should not be included here. *See* Req. at 25–26. Ironically, the case the Employer cites in support of its argument stands for the opposite proposition. *Canal Catering*, 339 NLRB 969 (2003). The Board does not consider bargaining history "when delineating units of previously unrepresented employees" but instead only "when it is assessing historical units that have had long periods of successful collective bargaining." *Canal Carting Inc.* 339 NLRB 969, 969 (2003), *quoting Trident Seafoods,* 101 F.3d 111, 118

(D.C. Cir. 1996). Here, there is no historical bargaining unit of librarians and the fact that the union unsuccessfully bargained for their inclusion is irrelevant to whether an *Armour-Globe* election is appropriate.

The Employer fails to meet its burden of demonstrating that the Regional Director's reliance on any of the factors demonstrating a "community of interest" between musicians and librarians was "clearly erroneous." There is abundant evidence on the record that a "community of interest" exists and nothing in the Employer's request comes close to a compelling reason for finding that the Regional Director made a mistake that prejudiced the Employer. *See Day* at 654. The Employer's request for review should be denied.

IV. Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Board deny Employer's Request and order such relief as the Board deems reasonable under the circumstances.

Alternatively, should the Board choose to accept Employer's Request, it would be prejudicial for there to be further determinations as to whether the librarians constitute an appropriate unit. During the hearing, the Union asked that the remaining librarians form their own unit should the Regional Director find that there is not a "community of interest" and the Employer did not object. For that reason, the Board should find that an appropriate unit exists among just the librarians should it find that there is not a "community of interest" between librarians and musicians.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019 the foregoing was filed electronically via email with the parties listed below:

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I further certify that on April 26, 2019 the foregoing was filed with the parties listed below via the NLRB portal with consent from opposing counsel for an untimely filing:

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